PRINCIPAL AND AGENT: TORT LIABILITY OF PRINCIPAL FOR NEGLIGENT ACT OF EMPLOYEE WHILE ENGAGED CONTEMPORANEOUSLY IN THE PERFORMANCE OF HIS OWN AND HIS EMPLOYER'S BUSINESS—Is an employer one hundred percent responsible for the tort of his employee committed at a moment when he was but fifty per cent within the scope of his employment and fifty per cent on his own? The court in the case of *Brimberry v. Dudfield Lumber Company*[1] held that he was. There the employee at the time of the collision was at the same time both engaged in the completion of a business errand and on his way home after the close of a business day. He had deviated from his direct route home to have a check countersigned for his employer, which he was to bring with him to the office in the morning. It was as a result of his negligence that the collision took place after he had had the check countersigned and at exactly the moment that he was once more after the deviation entering upon his ordinary route home. The automobile that he was driving at the time was the property of his employer but had been turned over to him for his own use.

This latter fact, though it appears in the findings, would seem to be unimportant, for the automobile has been all but universally accepted as not being such a dangerous instrumentality as to make applicable the law affecting the liability of the owner of a dangerous instrument.[2] Also, the fact that the automobile was owned by the employer and was used part of the time by his employee for business purposes would have no force probative of the vicarious liability,[3] nor is the employer usually held responsible because his employee was at the time using his vehicle with his permission in going to[4] or from work.[5]

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[1] (August 31, 1920) 60 Cal. Dec. 150, 191 Pac. 894.

[2] Danforth v. Fisher (1908) 75 N. H. 111, 71 Atl. 535; Jones v. Hoge (1907) 47 Wash. 663, 92 Pac. 433; Cunningham v. Castle (1908) 127 App. Div. 580, 111 N. Y. Supp. 1057; Indiana Spring Co. v. Brown (1905) 165 Ind. 465, 74 N. E. 615; also see 14 L. R. A. (N. S.) 216; 67 Central Law Journal, 467-468; Huddy on Automobiles, § 29, n. 4.

[3] "The test of an owner's liability for tortious acts of his employee while driving the former's automobile is the nature of its use at the time of the accident; whether or not it is then being used in the transaction of the owner's business. The fact of ownership plus the fact that the driver is an employee of the owner will do no more than make out a prima facie case." Martinelli v. Bond (1919) 29 Cal. App. Dec. 240, 183 Pac. 461; 1 Thompson, Commentaries on the Law of Negligence, § 526; Berry on Automobiles (2d ed.) § 872 and 891; Davis on the Law of Motor Vehicles, § 216; Mullia v. Ye Plantry Bldg. Co. (1916) 32 Cal. App. 6, 161 Pac. 1118; Mauchle v. P. P. I. E. (1918) 37 Cal. App. 715, 174 Pac. 404; Brown v. Chevrolet Motor Co. (1919) 38 Cal. App. Dec. 338, 179 Pac. 697; Maupin v. Solomon (1919) 38 Cal. App. Dec. 1231, 183 Pac. 198; Gausse v. Lowe (1919) 39 Cal. App. Dec. 12, 183 Pac. 298.

[4] Nussbaum v. Trang Label Co. (1920) 31 Cal. App. Dec. 778, 189 Pac. 728.

[5] Mauchle v. P. P. I. E. (1918) 37 Cal. App. 715, 174 Pac. 404. There is a dictum in the case of Hall v. Puente Oil Co. (May, 1920) 32 Cal. App. Dec. 306, 191 Pac. 39, which seems to throw some doubt on this, as well as upon the decision in the principal case. In this case the company also turned its automobile over to its employee for business purposes, permitting him to use it for his own pleasure as well. The court said, "Since the

The basis upon which the court did place the defendant's liability was respondeat superior, and this it did by an application of the following rule, "Where a servant is allowed by his master to combine his own business with that of his master's or even to attend to both at the same time, no nice inquiry will be made as to which business the servant was engaged in when a person is injured as a result of his negligence; but the master will be held responsible unless it clearly appears that the servant could not have been serving his master in the act the negligent performance of which caused the injury",[6] a rule which, in spite of the fact that it is not substantiated by a great mass of cases,[7] has been expressed by at least two authoritative text writers.[8]

It is commonly held that an employee is engaged in his employer's behalf while on the return trip of an errand quite as much as while going to the place of performance;[9] and by applying the above quoted rule, after having found that while the employee was engaged in the completion of a business errand he was also partially engaged in his own behalf because on his way home, the court in the principal case would seem simply to have determined to refrain from refining too nicely in the application of the doctrine of respondeat superior. In short, the court here has adopted a rule of convenience. That it is convenient of application is clear when we realize that if the rule were less general, extreme geographical refinements would have to be made. This is well illustrated by the facts in the case under discussion, for had the court chosen to overrefine there, might it not have been necessary to determine exactly how much of the automobile had at the moment of the accident passed over an imaginary line separating the deviation necessitated by the errand and the employee's direct route home? Is not this a too precarious basis upon which to place a decision as to the existence or non-existence of vicarious liability?

May not the soundness of the rule be questioned however by an inquiry as to why the employer is held responsible in these doubtful

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garage in which he kept the car was in his home, taking the car from his place of employment to this garage would have been an act within the scope of his employment," and cited Riordan v. Gas Consumers' Association (1906) 4 Cal. App. 639, 88 Pac. 809, which can however be distinguished from the principal case. For there, in spite of the fact that it was during his noon hour, the superintendent was actually feeding the horse when it ran away, which horse had been hired by the employer for the business use of the superintendent, and which duty to feed and care for the horse during the noon hour was a duty the employer assumed when the horse and buggy were hired from the livery stable.

[6] Supra, n. 1, p. 155.

[7] Patten v. Rea (1857) 2 C. B. N. S. 606, 104 Eng. Rep. 354; Rahn v. Singer Mfg. Co. (1889) 26 Fed. 913; Carl Corper Brewing Co. v. Huggins (1900) 96 Ill. App. 144.

[8] 1 Shearman and Redfield on the Law of Negligence, § 147; 2 Mechem on Agency, § 1895.

[9] Thompson Machinery Co. (1915) 96 Kan. 259 150 Pac. 587; Howard v. Marshall Motor Co. (Kans. 1920) 190 Pac. 11; Phillips v. Western Union Telegraph Co. (1916) 194 Mo. App. 458, 184 S. W. 958.

cases? Is it just to decree that, "No nice inquiry will be made, but the master will be held responsible unless it clearly appears that the servant could not have been serving his master"? Why must the master, before he can escape liability, first satisfy this difficult *onus probandi?* The answer is apparent when the true basis of this vicarious liability is realized.

Why the sins of the servant are visited upon the master in cases where no personal fault can be attributed to him, and the act was unauthorized, is a question to which the answers have been more numerous than in harmony.[10] An eminent writer states that, "As every business in some way affects the public, the state, as the guardian of its interests, is compelled to lay down conditions upon which one may pursue his business"[11] That the public today is a silent partner in every business is unquestionable in view of the universality of workmen's compensation legislation. The modern economic-juristic concept of today, therefore, would seem to be that the personal injury or death of a workman being a social loss, it should be a first charge on industry—that is, indirectly on the public through the master.[12]

The basis of vicarious liability then, being public policy, is not the objection to the rule applied in the principal case, answered by a realization that the same public policy which lies back of workmen's compensation legislation also lies back of doctrines holding the employer in doubtful cases? Is there a real distinction between the case where a servant while working is injured, probably by another servant, and the case where the person who is injured by the servant is a stranger to the business? Do not both cases then come within the enveloping scope of the modern concept, and is the rule applied in the principal cases not only meritorious by virtue of its convenience of application but also because it is in harmony with what is today regarded as sound public policy, the true basis of the master's responsibility? *M. F.*

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[10] Oliver Wendell Holmes, Agency, 4 Harvard Law Review, 345; 5 id. 1; E. V. Abbott, The Nature of Agency, 9 id. 507; Frank Hubert, Why is Master Liable for Torts of his Servant?, 7 id. 107. H. F. Laski, The Basis of Vicarious Liability, 26 Yale Law Journal, 111.

[11] H. G. Laski, The Basis of Vicarious Liability, supra, n. 10.

[12] For typical economic opinion see Singer, Principles of Economics, p. 601; Taussig, Principles of Economics, vol II, p. 334; Eastman, Work Accidents and The Law; Willoughby, Workingmens Insurance, p. 327, Webb, Industrial Democracy, vol II, pp. 387-91. For judicial opinion see Howells v. Landore Siemens Steel Co. (1874) L. R. 10 Q. B. 62; Morgan v. Vale of Neath Ry. Co. (1865) L. R. 1 Q. B. 49.